

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-jmp

Adversary Case No. 1-09-01120-jmp

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

Debtors.

- - - - -x

KAIN KIN WON, et al.,

Plaintiffs,

-against-

HSBC USA, INC., et al.,

Defendants.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

October 28, 2009

2:16 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

1 HEARING re Motion Filed by HSBC USA, Inc. to Dismiss the Class
2 Action Complaint, Abstain or Stay the Adversary Proceeding.

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4 HEARING re Motion Filed by Lehman Brothers Special Financings
5 Inc. to Dismiss the Complaint.

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7 HEARING re Motion Filed by HSBC Bank (Cayman) Limited, et al.,
8 to Dismiss, Abstain or Stay the Adversary Proceeding.

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P R O C E E D I N G S

THE COURT: Be seated, please. Good afternoon.

MR. SLACK: Good afternoon, Your Honor. Richard Slack from Weil Gotshal on behalf of the debtors.

This afternoon we have on the agenda the motion to dismiss the Wong adversary proceeding that was filed by LBSF. There's also motions to dismiss filed by the other defendants, including HSBC, who are separately represented.

Your Honor, before getting to the motions to dismiss there are two items I wanted to bring to the Court's attention as a matter of update. The first, Your Honor, and you may know this already, is that at the same time that Your Honor was holding the last omnibus hearing on adversary proceedings the parties here were arguing a motion to withdraw the reference in front of Judge Swain. Argument took place, the Judge dictated a decision on the record and asked us, at the conclusion of the hearing, to provide a copy of the transcript to Your Honor, which we did on Friday, October 16th.

THE COURT: I received that and I read it.

MR. SLACK: The second item, Your Honor, before turning to the motion to dismiss is that the Court may wish to know that there have been settlement negotiations, not between the parties here, Your Honor, but between the regulatory authorities in Hong Kong and the banks that issue the minibonds, which is not HSBC but the local banks that issued

1 the minibonds. And under this negotiated settlement the
2 issuing banks have agreed to buy back the minibonds from the
3 noteholders at either sixty percent or seventy percent,
4 depending on certain circumstances. And the minibond holders
5 agreed, to quote, "Withdrawn, permanently discontinue any
6 ongoing legal proceedings or mediation arising from or in
7 connection with the minibonds."

8 The settlement, Your Honor, is an opt in settlement.
9 So no minibond holder who did not affirmatively choose to
10 accept it would be a part of it. And settlement packets were
11 sent out, as I understand it, the week of August 7 through 13
12 and the minibond holders had sixty days to respond.

13 According to the Hong Kong Monetary Authority press
14 release from October 23rd, there were approximately 25,000
15 noteholders who were eligible to receive, and that's a number,
16 essentially, of the class here who were eligible to receive the
17 offer. Of that 25,000 approximately 24,300 responded to the
18 offer. And of the ones that responded, of the 24,300, 99.1
19 percent of the minibond holders agreed to the settlement. That
20 means that with respect to the 25,000 potential class members
21 here, approximately ninety-seven percent have agreed to turn
22 over their minibonds to these issuing banks and have foregone
23 litigation on their minibond holdings.

24 One point, Your Honor, that I would make is that we
25 don't know, we haven't been informed by the plaintiffs, whether

1 the name plaintiffs in this case have responded to that offer
2 or whether the name plaintiffs have agreed to that offer or
3 have just not responded. The 99.1 percent, as I understand it
4 Your Honor, is an interim number in that there are still some
5 days for some people to be counted. So that number could
6 actually grow.

7 The last point, Your Honor, is that my understanding
8 of the people who accepted it, ninety-nine percent of those
9 have already received their money. So that the settlement has
10 been effectuated with respect to ninety-nine percent.

11 So what I would like to do, Your Honor, again just for
12 informational purposes, I have the Hong Kong Monetary Authority
13 press release that I would like to hand up to Your Honor, if
14 that's okay?

15 THE COURT: That's fine.

16 (Pause)

17 THE COURT: Thank you.

18 MR. SLACK: And Your Honor, with your permission I'll
19 move on to the motion to dismiss.

20 THE COURT: I'll give you the permission but let me
21 just ask you a question.

22 MR. SLACK: Okay.

23 THE COURT: What impact, if any, does the press
24 release, but more importantly the fact of settlements in Hong
25 Kong with minibond holders representing a significant percent

1 of the class, have on the present motion to dismiss? Is it
2 just for my information or is it something that as moving party
3 you believe I should be taking into consideration in respect of
4 the matters before me?

5 MR. SLACK: Two things, Your Honor. One, that press
6 release is not necessary for Your Honor and the arguments I'm
7 going to be presenting in your ruling today. So it's not a
8 necessary part of Your Honor's decision in our view.

9 It does have an impact, potentially, on two issues
10 that Your Honor may decide to reach. The first, Your Honor, is
11 whether it makes sense to allow the plaintiffs here to replead,
12 as I'll get to it. We don't think that's appropriate. If Your
13 Honor was considering whether to allow the plaintiffs to
14 replead this as a derivative action, then a consideration is
15 under Rule 23.1 the plaintiffs here would have to be
16 representative of the noteholders as a whole. And we believe
17 that it would be a futile act to try to plead that somebody who
18 represents one, two or three percent of the noteholders because
19 they wouldn't be representing the interests of ninety-seven
20 percent of the noteholders as of today, could in fact plead
21 under 23.1 the requisite typicality in order to allow them to
22 replead.

23 But Your Honor, again, I don't believe that the
24 arguments that I'm going to make are going to require you to
25 reach anything having to do with the press release.

1 MR. SLOANE: Your Honor, Peter Sloane, Cahill Cahill
2 Gordon for the defendants other than the Lehman Brothers
3 entities and other than Bank of New York.

4 I just wanted to add one thing. For purposes -- I
5 agree with Mr. Slack entirely with respect to the necessity for
6 the Court to review that. However, with respect to the
7 arguments that we are making in addition to the standing and
8 the jurisdiction arguments, we've made some arguments about
9 forum non conveniens and that issue of what is going on
10 elsewhere is highly relevant to that argument.

11 In fact, annexed to the Song (ph.) affidavit, as Your
12 Honor I'm sure has seen, are the initial offer made to the Hong
13 Kong residents plus an update as of a few weeks ago. So it is
14 relevant if Your Honor feels that you should reach the issue of
15 forum non or abstention. For our purposes it would be.

16 THE COURT: Fine. Thank you.

17 MR. SLACK: May I proceed, Your Honor, to the motions?

18 THE COURT: Please.

19 MR. SLACK: Your Honor, the Wong action has been
20 brought by seven of, as I just said, about 25,000 noteholders
21 of an entity called Pacific Finance. The notes are sometimes
22 called minibonds and you've seen that in some of the press
23 releases and papers.

24 As I'll discuss in a moment, Pacific Finance, in turn,
25 entered into a swap agreement with LBSF. And the money from

1 both the noteholders and the LBS swap was put in a trust and a
2 trustee was appointed. And that trustee, at the minibond
3 level, was HSBC.

4 I'm going to be addressing, Your Honor, the three
5 causes of action against LBSF. The first cause of action was a
6 claim for a declaration that the estate has no interest in the
7 money at the minibond level or at the Sapphire level. As I will
8 get to that, Your Honor, is just not correct under the
9 governing documents.

10 The second cause of action, Your Honor, is really a
11 remedy rather than a separate cause of action, seeking a
12 preliminary injunction essentially for the same reason, on the
13 theory that LBSF doesn't have any interest in the funds. They
14 want a preliminary injunction preventing the money from going
15 out to LBSF under any circumstances.

16 And third, the noteholders here asked for a
17 constructive trust. So there are three causes of action but
18 they basically all ask and are based on the same idea that LBSF
19 is not entitled to any money, it's not an asset of the estate
20 as they put it, that's held as collateral right now by the
21 trustee.

22 We've moved to dismiss on two principle grounds, Your
23 Honor. First is an issue that Your Honor's probably well aware
24 of because we've dealt with it both in the motion to stay and
25 in a separate motion to intervene. And that is a standing

1 argument that these noteholders are creditors and are too
2 remote in order to bring the claims that they seek.

3 The second, Your Honor, is that under the governing
4 documents, in fact LBSF has a superior interest to the money
5 that's sitting in the trust at the minibond level. And since
6 all money, as I'll explain in a second, flows through the
7 minibond level, LBSF has an interest in the money that flows
8 through.

9 Before turning to the merits, Your Honor, it's
10 important, I think, to understand the structure. And again,
11 we've done this before and I'll try to do it quickly, but a
12 couple of preliminaries. In paragraph 45 of their complaint
13 the plaintiffs allege that the transactions here are virtually
14 identical in that there were twenty-eight series of minibonds
15 that were issued and they say that they're virtually identical.
16 And the question is, why did they plead that? And while I
17 don't like to try to get into the heads of my adversaries, I do
18 think the complaint answers that question to some degree. And
19 that is that they are trying to bring this as a class action
20 and they have seven plaintiffs. And they don't tell us which
21 of the minibond series their plaintiffs have bought into.
22 Instead, what they assert is that these seven, no matter which
23 minibond series they've bought into, can represent all of them.
24 And the reason for that is that they're virtually identical.

25 So Your Honor, having plead that they're virtually

1 identical and having a good reason for doing so under a class
2 action, we have taken that allegation as true and have based
3 our motion to dismiss on an example transaction, which is the
4 Series 10 transaction, as you might know from reading our
5 papers.

6 Your Honor, if you look at the structure chart here --

7 THE COURT: Can I stop you for a second, before we get
8 to the chart?

9 MR. SLACK: I'm sorry?

10 THE COURT: Let me just stop you for one second --

11 MR. SLACK: Yes.

12 THE COURT: -- before we go to the chart. I recognize
13 that there has been a pleading that the twenty-eight series of
14 minibond transactions are substantially identical and Series 10
15 is identified as a representative transaction. As a matter of
16 fact, is this structure identical in each of the twenty-eight
17 series or are there differences?

18 MR. SLACK: There are certain differences in the
19 documentation but the structure that is set forth in this chart
20 is going to be substantially similar in each of the
21 transactions. In other words, both -- all of them have Pacific
22 Finance issuing notes. All of them have Pacific Finance as the
23 swap counterparty. All of them have Pacific Finance taking as
24 collateral the Sapphire notes.

25 There are some differences in some of the terms of the

1 documents but the structure here of the transaction is, in fact
2 as I understand it, substantially similar.

3 THE COURT: Okay. And do all the transactions involve
4 the Sapphire notes?

5 MR. SLACK: Yes. All of the transactions, again as
6 we'll get to it, the minibond level the collateral, as I
7 understand it, is for each of the Pacific Finance transaction
8 the Sapphire notes.

9 THE COURT: Okay.

10 MR. SLACK: And if I'm wrong somebody -- one of the
11 people smarter in the courtroom will write me a note and I'll
12 tell you.

13 THE COURT: Fine. I'll be looking for that note.

14 MR. SLOANE: I'll talk about the note, Judge.

15 MR. SLACK: Your Honor, so the way this works, and I
16 actually went through a good part of what I was going to with
17 the transaction, is that Pacific Finance is an issuer and
18 issued notes to the minibond holders. So the noteholders here,
19 the plaintiffs here, are creditors of Pacific Finance. That is
20 their relationship with Pacific Finance.

21 In this transaction Pacific Finance entered into a
22 swap agreement with LBSF. There is no privity. There is no
23 contractual privity with the noteholders. There's no
24 relationship between LBSF and the noteholders. LBSF sole
25 relationship here is with Pacific Finance where it entered the

1 swap.

2 Now, what Pacific Finance did is they got the money
3 from the noteholders and they bought notes, which is the
4 collateral, for both the notes and the swap. And that
5 collateral is held by the trustee which is HSBC. And that is
6 essentially what we'll call the minibond level of the
7 transaction.

8 Now the reason there's two levels is that the notes
9 that they have for the minibond, that Pacific Finance bought
10 with the -- the collateral that Pacific Finance bought with the
11 money from the notes came from Sapphire Finance PLC. So the
12 relationship between Sapphire Finance PLC and Pacific Finance is
13 as a creditor. And Sapphire had a relationship with LBSF and
14 with the money that they got from Pacific Finance they bought
15 notes issued by a different German company. And those notes
16 are held by Bank of New York as the Trustee on the Sapphire
17 level.

18 The important thing here is that the minibond
19 noteholders, on the Sapphire level, are just simply creditors of
20 a creditor of the issuer of the notes and the counterparty
21 LBSF.

22 Your Honor, the standing issue with respect to the
23 noteholders I think is a very simple one and one that I think
24 we can deal with, at least in its basic form, very simply. I'd
25 like to put up Section 1.4 of the Principal Trust Deed of

1 Series 10.

2 So again, there's a relationship between, as we looked
3 at, LBSF and the issuer Pacific Finance. There's a trustee and
4 a trust deed for the collateral. The plaintiff's plead that
5 the principal trust deed, the supplemental trust deed and the
6 prospectus are the governing documents. And the principal
7 trust deed, at page 3, section 1.4, states, as you see on
8 there, "A person who is not a party to the principal trust deed
9 has no right under the contracts, Rights of Third Parties Act
10 1999, to enforce any term of this agreement except and to the
11 extent, if any, that this principal trust deed expressly
12 provides for such act to apply to any of its terms."

13 Your Honor, the principal trust deed was then
14 supplemented once for each series. So even though what we're
15 going to be talking about is the tenth supplemental trust deed,
16 what that means is that this is the tenth series, each series
17 got one supplement. So in the supplement that applies to the
18 series that we're talking about here though, you'll find this
19 in all of the series.

20 Section 6.2 at page 3 of the supplemental trust deed
21 has a very similar statement. That "A person who is not a
22 party to the tenth supplemental trust deed has no right under
23 the contracts," again, "Rights of Third Parties Act 1999, to
24 enforce any term of this tenth supplemental trust deed."

25 Under the plain terms of both the principal trust deed

1 and the supplemental trust deed the noteholders or any third
2 party has no right to act with respect to the contracts that
3 we're talking about here. The person who can act, Your Honor,
4 is the trustee under the trust agreement. And there are many
5 provisions throughout the principal trust deed that allow the
6 trustee to take actions on behalf of noteholders and on behalf
7 of the collateral.

8 But what's important is that there is no provision in
9 the supplemental trust deed, none whatsoever, that allows the
10 plaintiffs to bring an action, the noteholders, the creditors,
11 to bring an action with respect to the contractual rights, the
12 governing documents, under the trust deed or the swap.

13 Now Your Honor, that should, in our view, end this.
14 That's as simple as the argument is on standing. The -- you
15 have a creditor who's trying to assert the rights of
16 essentially its issuer. And the documents themselves say that
17 these creditors have no rights under the documents.

18 Now there's a lot of discussion, Your Honor, in the
19 briefs, principally by the plaintiffs, saying that
20 notwithstanding these expressed provisions that they should be
21 allowed to maintain an action as a derivative action.
22 Essentially saying that where, in their view, the trustee
23 doesn't act appropriately that they can bring a derivative
24 claim. And as a matter of U.K. law bring that derivative claim
25 on behalf of the trust instead of the trustee.

1 First point on that, Your Honor, is you don't have to
2 get there. This complaint was not brought as a derivative
3 claim. It was brought as a direct claim as a class action,
4 those are direct claims. And there are very particular and
5 special procedural rules that a plaintiff must comply with in
6 order to bring a derivative action. So even though we agree
7 that U.K. law would tell you when you can bring a derivative
8 action, Federal Rule of Civil Procedure 23.1 tells you what the
9 procedures are for bringing that action. And none of those
10 procedures, which are not technicalities, have been met here.
11 Just for example, Your Honor, if you are bringing a derivative
12 claim the complaint must be verified. That means that one of
13 the plaintiffs would have to issue a verification of the facts
14 in the complaint, all of the facts, and ultimately make himself
15 or herself available for deposition on that verification.

16 The complaint has certain -- there are certain
17 requirements that a complaint, certain elements, be pleaded
18 with particularity such as the reasons that they could not get
19 the trustee to act and what efforts they took to get the
20 action. And the third point, and this may be the most
21 important given the conversations we've had today already, is
22 that the plaintiffs would have to show that they could fairly
23 and adequately represent the interests of the other
24 noteholders.

25 Your Honor, we believe this would ultimately be

1 extraordinarily challenging, given that ninety-seven percent of
2 the noteholders here are not similarly situated and have
3 accepted a settlement where they've given up their notes.

4 To the extent there's any question as to whether 23.1
5 applies here, I would tell the Court that 23.1 doesn't speak
6 directly in terms of trust but the case law has applied 23.1 to
7 trusts. And in particular, Your Honor, the Eighth Circuit, as
8 an example, in the International Association of Firefighters
9 Local 2665 vs. The City of Clayton, held specifically that a
10 beneficiary to a trust could only "Bring this suit as a
11 derivative action that meets the requirements of Federal Rule
12 of Civil Procedure 23.1." This ruling was echoed in a case by
13 the Southern District which is the Dallas Cowboys Football Club
14 vs. The National Football League Trust and that's at 1996
15 Westlaw, 601-705 from 1996.

16 The other point, Your Honor, that the plaintiffs have
17 made here is that somehow they should be allowed to replead
18 this as a derivative action because they've shown what are
19 called special circumstances. And Your Honor, we, again, we
20 believe that that's going to be a futile act but I want to make
21 a point before I get there.

22 The claims that are brought today are brought in their
23 individual capacity. And those claims can be dismissed and
24 should be dismissed with prejudice. Whether or not the
25 plaintiffs bring a separate derivative action, which would then

1 have to comply with 23.1 and allow Your Honor to decide whether
2 there's typicality and they adequately represent and whether
3 there are special circumstances. That is something that is
4 truly not before Your Honor today.

5 Your Honor could, and we think it would be
6 appropriate, to rule that it would be futile. And why would it
7 be futile? Because, Your Honor, the cases that they cite, that
8 the plaintiffs cite, to establish special circumstances, they
9 do not raise in their complaint and they do not arise to the
10 level of special circumstances. They've raised two issues in
11 both their affidavits as well as their brief. The first is is
12 that the trustee has supposedly failed to act in -- essentially
13 claiming the collateral at the minibond level for itself. The
14 second is the trustee is supposedly conflicted, that HSBC is
15 somehow conflicted.

16 Going to the first one, Your Honor, the plaintiffs
17 cite no authority that seven of 25,000 beneficiaries because a
18 trustee isn't doing what they want them to do, those seven
19 beneficiaries can somehow bring a claim on behalf of the trust
20 and act instead of the trustee. There's absolutely no
21 authority for that and the reason is that it would cause chaos
22 in the law. You could have these seven bringing a claim here.
23 You could have another seven bringing a claim in Hong Kong.
24 You could have another seven bringing a claim somewhere else
25 against different parties. And the case law supports that,

1 Your Honor. The one case the plaintiffs attempt to cite for
2 the point is an 1886 case out of the U.K. It's the Meldrum
3 (ph.) case. It's cited by their expert. And what that case
4 says is exactly contrary, actually, to the point that the
5 plaintiffs are making here.

6 The English court stated in that case that "It's quite
7 settled that a new refusal to sue on the part of a trustee does
8 not entitle a trust to sue in his own name." And the quote
9 went on to say, "It would be monstrous to hold that whenever
10 there is a fund payable to trustees for the purpose of a
11 distribution amongst a great number of persons, every one of
12 those persons could file a separate bill in equity merely on
13 the allegation that the trustees would not sue."

14 And Your Honor, this is particularly problematic here.
15 Because the act that they're saying that the trustee shouldn't
16 take, and we're going to get here in just a moment, is that
17 they say the trustee should have tried to capture from LBSF the
18 collateral here. And as you'll see, the documents in the
19 minibond level specifically give LBSF a superior right. So
20 what the trustee has done here is, in our view, completely
21 appropriate in not seeking any kind of a lawsuit against LBSF
22 to capture that collateral.

23 With respect to the second special circumstance,
24 they've alleged that the trustee is somehow conflicted. And
25 what they say, Your Honor, is that there's a theory that there

1 are certain affiliates of HSBC that have a claim against a
2 different debtor, that is LBHI in this case. But that is
3 completely hypothetical. There's absolutely no allegation in
4 the complaint that there is any actual conflict. That there's
5 been a conflict raised, that it's had an effect. They just
6 raise the fact that some affiliate has some interest in another
7 debtor in this case.

8 Before I get to the other part of the merits I want to
9 talk briefly about the standing at the Sapphire letter.

10 Can I get the chart?

11 For obvious reasons, Your Honor, standing at the
12 Sapphire level is even more remote than the standing we just
13 talked about at the minibond level. Because what essentially
14 they want to do is, in the minibond level they want to usurp
15 the authority of the trustee, HSBC. When you get to the
16 Sapphire level you have a creditor of a creditor of an issuer.
17 But the authority they want to usurp here is really two-fold.
18 They have to usurp first the authority of HSBC which has the
19 ability to act on behalf of the collateral at this level, who
20 would then have to essentially be saying that they want to
21 usurp the authority of Bank of New York.

22 So you would have the minibond noteholders here not
23 only usurping the authority of one trustee but two trustees,
24 two separate trustees, and there has been absolutely no
25 allegation, whatsoever, that there is any issue with respect to

1 BNY. So there's a flaw in both the concept here in the
2 pleadings, even if you were to get that far and say that a
3 creditor of a creditor of an issuer should have rights to bring
4 suit against LBSF. And again, those rights would be at this
5 level, not even at this level.

6 A couple of points, Your Honor, that they make in
7 their brief with respect to this. The plaintiffs here say that
8 you can disregard, essentially, everything that you see in the
9 trust documents and go directly to article 3. And that article
10 3 is a panacea that allows them standing notwithstanding the
11 expressed terms of the trust documents. That's wrong on two
12 counts.

13 First, Your Honor, the case law is very clear that a
14 creditor of a party is not permitted to assert the contractual
15 rights of that party. Now we cite those in our brief. I'm
16 going to butcher this case because it's got a really awful name
17 but it's G & R Moojestic Treats Inc. vs. Maggiamoo's
18 International. And it's 2004 WL 1110423. And that's just an
19 example of that point.

20 The second argument they make is that somehow bringing
21 a declaratory judgment instead of a claim for monetary damages
22 cleanses the standing issue from the documents. And again,
23 there is no authority for that. They cite U.K. law that they
24 saw allows them to bring a declaratory judgment action. But
25 much like 23.1, whether a party can bring a declaratory

1 judgment action is a matter of procedure under U.S. law. And
2 under U.S. law it's clear that they cannot bring a claim as a
3 creditor where the documents say that they can't.

4 So Your Honor, I want to -- I've got a couple more
5 points but the main point I want to talk about is now to deal
6 with each of the causes of action one at a time and I think
7 fairly quickly.

8 The plaintiffs here not only have an inferior right,
9 LBSF has a superior right to the collateral. So if I could --
10 -- If you could put up, Rob, section 6.1.

11 Again, if you look at the principal trust deed, this
12 is the principal trust deed at section 6.1 at page 11, and this
13 is the provision that tells you that "The trustee shall,
14 subject to the provisions of each relevant supplemental trust
15 deed and the clauses 6.3 and 6.4 apply all monies received by
16 it, under the provisions of the principal trust deed and the
17 relevant supplemental trust deed and the relevant security
18 documents, if any, in connection with the realization or
19 enforcement of the security constituted thereby in accordance
20 with the priority specified in the relevant supplemental trust
21 deed and as such priority is set out in condition 4(b)."

22 And let me tell you what all that means. There are
23 actually, in the trust deed, there are three types of
24 priorities that you can have in one of these trust deeds. You
25 can have a priority that says derivatives counterparty

1 priority, that simply means that the derivative counterparty,
2 which is LBSF here, has priority over the noteholders. There's
3 pari passu ranking priority, and that means that they share.
4 And then there's noteholder priority where the noteholders have
5 priority.

6 So when you look at the supplemental trust deed and
7 you go to section 53(b) of the supplemental trust deed, and
8 that is at page 15 of that supplement, it says that the trustee
9 shall apply, and I won't read it, Your Honor, but it says the
10 trustee shall apply the monies, as you can see, in accordance
11 with derivative counterparty priority. And so 53(b) chooses
12 the derivative counterparty priority as amongst the three types
13 of different priorities.

14 And then if you go to section -- which is condition
15 4(b). If you go to condition 4(b) which is at page 73 of the
16 principal trust deed, and in 4(b), just so you know, if you
17 chose another priority there's a different waterfall. But in
18 the derivative counterparty priority it specifies that (b) the
19 money flows first to the derivative counterparty. And then in
20 (c) it flows to the noteholders.

21 And, Your Honor, the other documents that the
22 plaintiffs like to say is important is the prospectus, which is
23 attached as Exhibit C to the affidavit, and I may get this
24 wrong, Sing Heung (ph.). And this is the prospectus that went
25 to each of the noteholders so it should be no surprise as to

1 what I just said. And it says, "Under the trust deed the
2 claims of Lehman Brothers Special Financing, Inc. or Lehman
3 Brothers Finance S.A. as swap counterparty for any amounts due
4 to it under the swap arrangements, including any termination
5 payment as compensation for early termination, will be paid
6 first out of the proceeds of the collateral before the claims
7 of the noteholders are met." So no surprise that this is the
8 way the documents work. Everybody was told that right up front
9 and for the record that's page 18 of the prospectus.

10 So Your Honor, again, the noteholder -- the priority
11 here, and in terms of LBSF's interest in the collateral, is
12 expressed in the documents. The only point I want to make, if
13 we could get back the structure chart --

14 (Pause)

15 MR. SLACK: -- is that regardless of what the
16 documents say at this level, at the Sapphire level, in order for
17 these noteholders to receive money, it must flow up through the
18 minibond level. And so the way the documents read, the ones we
19 just looked at, the principal trust deed at the minibond level
20 indicates that for all money that flows up to these
21 noteholders, to these particular plaintiffs, that LBSF gets
22 their share first and in fact has priority over that
23 collateral. It doesn't matter what the documents say here.
24 Let's say, for example, that LBSF doesn't have priority here,
25 then the money goes to the noteholders, which is Pacific

1 Finance in this case. But the money that's at Pacific Finance,
2 again, is held by HSBC. LBSF has priority at this level under
3 the documents that we just saw.

4 Your Honor, the last two claims I think, and I'm going
5 to be even briefer, are injunctive relief, which is cause two,
6 and the only point that I'll make in addition to the one that's
7 made in our papers, is that there is no irreparable harm here.
8 If, for whatever reason, money is distributed to LBSF and this
9 Court were ever to find that the money should not have gone to
10 LBSF, LBSF is sitting on a fairly substantial pot of money that
11 can be paid out if need be.

12 The third claim is a constructive trust and the only
13 point I want to make there, again we've briefed this, I think,
14 fairly extensively, is that where you have an actual trust,
15 which is what we have here, the law doesn't allow you to impose
16 a constructive trust over the same money. And we've cited the
17 cases in our brief with respect to that.

18 So in conclusion, Your Honor, we think there's an easy
19 and ready path, under the plain terms of the documents. The
20 plaintiffs here have chosen to bring their claims as direct
21 claims and under the plain governing document terms they can't
22 do that. Similarly, they allege that LBSF doesn't have any
23 right to the collateral. And again, the plain terms of the
24 documents support that.

25 So it's our view that the claims should be dismissed

1 with prejudice and that the Court doesn't need to address any
2 of the derivative pleading issues that have been raised by the
3 plaintiffs.

4 THE COURT: All right. Thank you.

5 MR. SLACK: Thank you.

6 THE COURT: Mr. Sloane is coming.

7 MR. SLOANE: Afternoon, Your Honor. Peter Sloane from
8 Cahill Gordon for all the defendants other than Lehman Brothers
9 and other than the Bank of New York.

10 Your Honor, first question I know the Court considers
11 in any of these proceedings is does it have jurisdiction over
12 this. And the answer is, the Court does not have jurisdiction
13 over this because standing, Mr. Slack was talking about it
14 extensively, is jurisdiction. And the Second Circuit has said
15 so in the Central States case which is 433 F.2d 181. And the
16 quote, which I think is worth reading because jurisdiction is
17 very fundamental is, "An essential an unchanging part of the
18 case or controversy requirement of Article III. If plaintiffs
19 lack Article III standing, a Court has no subject matter
20 jurisdiction to hear their claim because the standing issue
21 goes to the court subject matter jurisdiction. It can be
22 raised sua sponte in the event it's been raised by both parties
23 regardless." So the standing issue is a fundamental issue for
24 the Court to address.

25 The other point, Your Honor, in terms of the question

1 that was asked earlier about the news article, the Court is
2 entitled and the Court referenced this in the telephone
3 conference we had about looking to the four corners of the
4 pleading. On a motion directed to standing or forum non, the
5 Court is permitted to look to matters outside the pleading.
6 It's footnote 9, page 9 of our brief, of our reply brief.

7 So a few preliminary points for the Court, let's face
8 what's really going on here, Judge, and Mr. Slack has alluded
9 to it. And it is highly relevant to part of our arguments to
10 say it and to say it plainly. The plaintiffs were looking for
11 a hook, a hook to get jurisdiction in the southern district in
12 a federal court. And a hook was a class action that is not
13 available anywhere else, not available outside the U.S. nor
14 contingent fees available outside the U.S.

15 So what the plaintiffs have tried to do is to shoehorn
16 claims into this Court's bankruptcy jurisdiction recognizing,
17 we submit, that otherwise there would be no jurisdiction and
18 there would be no proper forum. Now the reason I think it's
19 relevant, without suggesting I'm framing accusations at the
20 plaintiff's counsel, is because forum shopping is a fundamental
21 issue on a forum non analysis. And if there is evidence of
22 forum shopping it speaks directly to the forum non question.

23 Judge Swain, in her decision, referenced the question
24 of the timing of all of the proceedings, the motion to withdraw
25 the reference, etcetera, and at least alluded to the fact that

1 it appeared there might have been some forum shopping there.
2 That, Your Honor, was totem pole forum shopping. The first
3 forum shopping was right here. And as I say, the case law
4 we've cited makes clear that it is relevant to the question of
5 the proper forum.

6 Now, I just want to point out a few other things, and
7 I know Your Honor's read the briefs very carefully so I'm not
8 going to try to state things that are obvious from the briefs.
9 But first of all, there is no defendant in this case that is
10 the trustee. The trustee is another entity called HSBC Bank
11 U.S.A. N.A. And we told the plaintiffs that before they say in
12 the briefs well we didn't present them with the proper
13 stipulation. Look, it's been a long time; they had plenty of
14 avenues to bring in the proper trustee. But the trustee is not
15 even a party to this case so that is point number one.

16 Point number two is this question that Mr. Slack
17 alluded to of the news article about what is going on in Hong
18 Kong. And as we allege and support in the Song affidavit,
19 Exhibits A and B and C, not only does the Hong Kong statutory
20 scheme or regulatory scheme make clear that anyone who agrees
21 to submit to that scheme gives up rights, but it also says they
22 give up their notes which is the point Mr. Slack made earlier.

23 In all of this it seemed to me one fundamental
24 question is, jurisdiction aside we want to turn to forum non
25 and the analysis there, why would this Court entertain the

1 special burdens and procedural complexities and the delays
2 associated with a class action, a class action of indirect
3 claims for relief. I say that, HSBC says that but Your Honor
4 actually the plaintiffs' counsel themselves said it. Because
5 in the motion to withdraw the reference, and is docket 56 in
6 this case, page 18 of their withdrawal brief, they say "While
7 Federal Rule of Bankruptcy 7023 incorporates Rule 23 of the
8 Federal Rules, consideration of a class action with members
9 numbering in the tens of thousands dramatically increases the
10 burden on the bankruptcy court already balancing the interest
11 of tens of thousands of other creditors." That's the
12 plaintiff's -- that's what they said to Judge Swain and we
13 agree with that.

14 This Court shouldn't be burdened with a class action
15 and the legal framework by which this Court can dispose of this
16 case quite simply is both the standing argument at both levels,
17 and I want to come back to that in a second, jurisdiction
18 because both -- in the complaint they plead that the first
19 three counts were core but in the motion to withdraw they
20 called them related to. In the complaint they plead that the
21 counts IV to XIII were related to and in their motion to
22 withdraw they called them, "Solely nonbankruptcy claims
23 involving issues of contract interpretation." Your Honor, we
24 agree with that too. That's all they are. They're a fight
25 between nondebtors.

1 Now, I wanted to -- I said that I was going to refrain
2 from passing a note and just mention one thing about the
3 structure. Mr. Slack is right; the basic structure is the
4 same. The special purpose vehicle was not always Sapphire. It
5 was -- there were other entities, other names. The basic
6 structure was the same and what differed, of course, and I say
7 of course but what differed was that there were -- the
8 waterfall provisions are slightly different in some of the
9 series then the others. It doesn't change the basic analysis
10 at the minibond levels about standing or anything else but they
11 are slightly different.

12 And let me just add one other thing, because I know
13 the Court has struggled with arguments that have been made in
14 other cases on this question of the waterfall and some have
15 called it the flip clause, that has absolutely nothing to do
16 with this case. There is no issue in this case of the flip
17 clause because the question is do they have standing to even
18 raise the issue. So the Court need not deal with that issue
19 here. It's not actually presented here and it's not relevant
20 or necessary to any of the arguments on standing.

21 The final point I want to make, Your Honor, and then
22 I'm going to sit down unless the Court has questions is this
23 question of forum non which, again, the Court could easily
24 reach looking at matters outside the pleadings. But it doesn't
25 really have to because it's clear, by their complaint itself,

1 there's not a single plaintiff that is a resident here.

2 The prospectus says the minibonds are not registered
3 here. The prospectus says the notes are not available to U.S.
4 persons. We've argued the tenuous connection in the Gazzini
5 (ph.) case to jurisdiction over any of the HSBC entities. And
6 what really sums it up is the Morrison case, Your Honor, where
7 the Court talked about the fact that we, here, Your Honor is an
8 American court not the world's court. And the Court said we
9 cannot and should not expend our resources resolving cases that
10 do not affect Americans or involve fraud emanating from the
11 U.S. And that's precisely the situation here and the fact that
12 ninety-nine point whatever percentage of the class has
13 participated in a settlement brokered by the Hong Kong
14 regulatory authorities underscores that dramatically, Your
15 Honor.

16 We've also argued extensively the jurisdiction, as a
17 personal jurisdiction issue. I don't think the Court has to
18 reach that but I think it's clear that under Gazzini the
19 allegations here don't rise to the level of facts asserted in a
20 pleading that give rise to a prima facie showing of
21 jurisdiction. And we've also briefed and argued the abstention
22 issue. Again, I don't think necessary for the Court's
23 determination on this motion.

24 The Court can easily determine the sufficiency of the
25 complaint on the question of jurisdiction and that question is

1 the question of standing.

2 Thank you, Your Honor.

3 THE COURT: All right. Thank you. I have a question
4 that's really for Mr. Slack and it's a question about the
5 impact of the, I'll call it, the repurchase of the minibonds
6 under the authority of the Hong Kong Monetary Authority
7 program, which apparently enables those institutions in Hong
8 Kong that sold the minibonds in the first instance to reacquire
9 them at, I gather, sixty percent of face in certain instances
10 and seventy percent for people who are sixty-five and older.

11 MR. SLACK: That's correct, Your Honor.

12 THE COURT: This may be well beyond the scope of this
13 argument but it occurs to me that in effect unless everything
14 is being unwound as a result of those purchases, the banks are
15 simply becoming the noteholders.

16 MR. SLACK: That would be my understanding, Your
17 Honor.

18 THE COURT: And if the banks are becoming the
19 noteholders, the banks presumably are in a position to now look
20 to HSBC Bank U.S.A. as trustee. And demand or direct or do
21 whatever it is that noteholders do in respect of their trustee,
22 is that correct?

23 MR. SLACK: That's exactly my understanding, Your
24 Honor. In fact I think, and maybe Mr. Sloane can give some
25 color to this, my understanding of the way this works is that

1 as part of the settlement the banks, the issuing banks, are
2 providing the trustee with funding and indemnity in order to do
3 whatever it is that the trustee thinks is appropriate in order
4 to maximize the value of the collateral.

5 I may have said that slightly differently but --

6 MR. SLOANE: May I respond on that, Your Honor?

7 THE COURT: Mr. Sloane, why don't you respond on that
8 as well?

9 MR. SLOANE: The banks that are actually subject to
10 the settlement are called the distributing banks; they're not
11 the selling banks. The distributing banks, indeed subject to
12 the terms of all their indemnities and back and forth are going
13 to step into the shoes of the noteholders and may well decide,
14 they're all Hong Kong banks as I understand it, that whatever
15 resolution they seek, whether it's some kind of a lawsuit or
16 negotiated settlement, is something that they should do.
17 Indeed the scheme of the whole settlement contemplates that
18 they willing to and get some portion, that extra ten percent of
19 the proceeds from the trustee.

20 Now again, I'm not saying they have a right to it
21 absolutely. I'm not saying we don't have defenses, these are
22 complicated transactions. But that is, indeed, my
23 understanding of the way it would work. So that is a matter
24 that awaits the outcome, whether subject to settlement or
25 subject to further litigation. But it's not here.

1 THE COURT: Right. Okay. Thank you.

2 MR. SLACK: Your Honor, just to echo one thing that
3 Mr. Sloane said, because I requested a note and I did get a
4 note. And what I was told is very similar to what Mr. Sloane
5 said that with respect to the Sapphire level there were three
6 issues, so not just Sapphire but there were two other issues.
7 But that -- and that there were different collateral that they
8 bought. So in our chart here, for ten, they bought collateral
9 from a German bank. But that essentially the structure is the
10 same where whether it's Sapphire or one of the other issuers
11 would be in that spot and would buy collateral from a third
12 party, which was all the way at the bottom of the chart that we
13 had up here today. But that essentially the structure of the
14 transactions that we put there is the same and on the minibond
15 level is absolutely the same, Your Honor.

16 THE COURT: So Pacific Finance is the common element
17 in all structures?

18 MR. SLACK: That's my understanding of the structures
19 in this series.

20 MR. SLOANE: Yes, Your Honor.

21 THE COURT: Okay. Thank you. Okay. I'll hear from
22 counsel for the Wong plaintiffs.

23 MR. DAVIS: Good afternoon, Your Honor. Jason Davis
24 on behalf of the Wong plaintiffs of the Coughlin Stoia firm.

25 I'm going to be addressing LBSF's arguments and the

1 way I'd like to proceed, if it pleases the Court, is first
2 address the two key standing arguments that LBSF makes. And
3 then secondly address both the repurchase and the question
4 regarding the similarity of the documentation between series.

5 THE COURT: Just so I'm clear on what's happening at
6 this point, are you limiting your presentation to the LBSF
7 arguments and will one of your colleagues be dealing with the
8 HSBC argument?

9 MR. DAVIS: Yes.

10 THE COURT: Or are you dealing with everybody's
11 arguments?

12 MR. DAVIS: Yes, Your Honor. My colleague, Luke
13 Brooks, also of the Coughlin Stoia firm, will be responding to
14 HSBC's arguments.

15 THE COURT: Okay.

16 MR. DAVIS: Thank you. The plaintiffs in this case,
17 Judge, seek to represent a class of investors in collateralized
18 bonds called minibonds or notes. They were issued by Pacific
19 International Finance.

20 The notes defaulted because of Lehman's September 15,
21 2008 bankruptcy. Now the notes have been in default for over a
22 year but these notes were collateralized by assets set in its
23 trust that was supposed to be released under these exact
24 circumstances. That collateral, the Sapphire notes, still
25 hasn't been released. It's still in limbo.

1 On November 25, 2008 LBSF sent a letter to the trustee
2 of the minibonds program, HSBC, and told HSBC to cease and
3 desist from taking any action to unwind the entire program.
4 The two reasons were the entire program; the entire 1.6 billion
5 dollar bond program was subject to the automatic stay. The
6 second reason was an argument that the provisions, the priority
7 provisions, I believe in the Sapphire bond the assets that's
8 sitting in trust supporting the noteholders, were unenforceable
9 as a matter of law.

10 Now that letter also included on the list the actual
11 Pacific International Finance notes. So LBSF sent a letter to
12 HSBC stating that the entire program, subject to the automatic
13 stay, and both the Pacific International notes and the assets
14 held in trust by HSBC were effectively frozen. Here we are
15 today, over a year later, and those assets still have not been
16 released. And the reason we've come to the Court, Your Honor,
17 is to break the log jam.

18 These bonds have not been paid back. While there is a
19 repurchase, they're still outstanding. All of these questions
20 as to noteholder priority and to priorities in general are
21 still outstanding. And I just want to make a point with
22 respect to the relationships that were up on the chart before.
23 Now LBSF concedes --

24 THE COURT: Would it help you to have the chart?

25 MR. DAVIS: It would. I don't want to take his work

1 product.

2 MR. SLACK: You're welcome, if it would be helpful, to
3 use the chart.

4 THE COURT: Why don't we share the use of the debtor's
5 chart?

6 MR. DAVIS: Now if you look -- so this chart is useful
7 to show the relationships in a predefault environment.

8 THE COURT: Do you accept the chart, by the way, as a
9 fair depiction of the structure?

10 MR. DAVIS: I'd say it's incomplete and I'll just
11 point out a couple of issues where I think it's incomplete.

12 So in a predefault environment I think it shows the
13 relationships reasonably well. The problem, Judge, is we're
14 not in a predefault environment; we're in a postdefault
15 environment. And you can see that box, HSBC U.S.A. as trustee.
16 Well, the trustee actually holds the Sapphire notes in trust for
17 the benefit of the noteholders. And so there aren't really two
18 levels in a postdefault environment, the levels collapse. And
19 the question is, who's the rightful owner of the Sapphire notes
20 and how much.

21 THE COURT: I don't understand what you just said
22 about a collapse as a result of a default. In what respect is
23 the structure different?

24 MR. DAVIS: The structure -- the focus is different,
25 Judge, because after Pacific International Finance notes

1 default, then the investors look to the collateral. The focus
2 isn't on Pacific International Finance because the notes are
3 limited recourse obligations. And the documents specifically
4 say that the investors shall have recourse to the mortgaged
5 property. And the way that the documents define mortgaged
6 property is reference to the Sapphire notes that are sitting in
7 trust -- that are sitting in trust governed by HSBC for the
8 benefit of the noteholders under these exact circumstances when
9 the bonds default.

10 THE COURT: Well I understand that argument but
11 counsel for LBSF says today, and frankly I heard this argument
12 some months ago in connection with your motion to intervene in
13 another adversary proceeding and in connection with request to
14 stay discovery and I don't know to what extent that hearing led
15 to the subsequent motion practice leading to attempts to
16 withdraw the reference, but that doesn't matter for today's
17 purposes.

18 What I did note, however, and I think I commented to
19 this effect to you during the course of the argument, was that
20 the holders of minibonds were remote relative to the dispute
21 that was then before me. In what respect are they any closer
22 to the action now?

23 MR. DAVIS: Yes, Your Honor. They're directly related
24 to the action and I'll just cite a couple of lines from LBSF's
25 own papers. They say that plaintiffs' claims are directed at

1 collateral underlying a trust to which they are beneficiaries.
2 As trust beneficiaries in a postdefault context, the assets
3 that were held in trust waiting, in the unlikely event that
4 LBSF went bankrupt, all of those rights have sprung up as a
5 consequence of LBSF's bankruptcy.

6 What's supposed to happen and what would have happened
7 if HSBC's declaration is to be believed, is the Sapphire notes
8 would have been liquidated and distributed to the noteholders.
9 Now the reason -- so Judge, from plaintiffs' perspective the
10 only reason that the bonds haven't been redeemed consistent
11 with the terms of the trust is because LBSF sent a letter to
12 the trustee saying cease and desist, take no action, distribute
13 nothing, don't follow the terms of the trust. And we're not
14 mere creditors of a creditor, that much is true Judge. But in
15 a postdefault context the primary relationship that every
16 single bondholder of a recourse bond looks to are the assets
17 supporting the bond and their trust beneficiaries, their own
18 papers, acknowledge that. And even their English law expert,
19 Judge, if I may they submitted an English law expert's opinion
20 on this whole subject. And in paragraph 8 of his supplemental
21 opinion he says "The minibond investors are entitled to
22 security rights junior to those of LBSF at the retail or
23 Pacific Finance level." So even their own English law expert
24 recognizes that plaintiffs have security rights and their
25 expert goes further when he analyzes security rights with

1 respect to LBSF. What he says is under English law it's
2 property in the hand of the holder.

3 So in this case, Judge, the plaintiffs are trust
4 beneficiaries. They hold a security interest in the Sapphire
5 notes which were assets placed in trust by the debtor, Pacific
6 International Finance, to repay the minibonds under these exact
7 circumstances.

8 And Judge, we cite case law in the brief, under New
9 York law, that says under these circumstances plaintiffs who
10 are trust beneficiaries have standing to seek an adjudication
11 of the terms of the documentation and the rights and
12 responsibilities of the parties.

13 What do we have? We have trust beneficiaries, a
14 trustee, HSBC, and a piece of property. And the question is,
15 to whom does it belong? Under New York case law, and we cite
16 Boyd and Kelley (ph.) in support of that concept, the law is
17 clear in this state that plaintiffs have standing to seek an
18 adjudication, to come to this Court and ask the Court to break
19 the log jam. Under English law, which LBSF contends is
20 applicable in this instance, the outcome is exactly the same.

21 Now unfortunately the Court as dueling experts. LBSF
22 submitted an expert opinion with their motion, plaintiffs
23 submitted a response and then their experts submitted an
24 additional declaration. The experts come out on opposite sides
25 of the coin. Professor McCormick, who provided his declaration

1 for LBSF, concluded that trust beneficiaries don't have
2 standing to seek a declaratory relief. And under contracts
3 law, if they're not parties to the contract they don't have
4 standing. Now Professor Odata (ph.) who provided an opinion
5 with plaintiffs' response said that's not true in declaratory
6 relief action. All that matters is that a plaintiff have
7 interest that are vitally affected by the subject matter.

8 Now, how does the Court resolve these dueling experts?
9 I think there's a real world example that all us are very
10 familiar with and that's the Perpetual matter that's occurring
11 in London. Now the Perpetual matter in London, Judge, was
12 brought by Perpetual who was a noteholder. All Perpetual was
13 was a noteholder in that case and Perpetual sued the trustee
14 under the bond program. Those bond documents are in the record
15 with LBSF's summary judgment motion. Perpetual's name appears
16 nowhere in those documents, nowhere. Perpetual is, for
17 procedural purposes, for the purposes of figuring out standing,
18 identically situated to the plaintiffs in this case, Judge,
19 with the following exception that LBSF will point out.

20 Now in that case Perpetual was seeking an adjudication
21 of just the trust terms of the documents governing the trust.
22 So the similar analogy would be, Judge, plaintiffs in this case
23 seek an adjudication of the documentation governing the trust
24 relationship between them as trust beneficiaries and HSBC as
25 the trustee. The difference in this case, Judge, is we're also

1 seeking an adjudication as to the sole asset that's sitting in
2 trust. And what is a trust, Judge, if it has three elements to
3 it, a beneficiary, a trustee and an asset. And plaintiffs
4 submit that the Perpetual decision is a very clear indicator
5 that a noteholder, though not a party to the contract and
6 though just a fiduciary under the collateral trust, does indeed
7 have standing to sue in England.

8 THE COURT: I don't mean to disagree with what you've
9 just said, and I'm not even sure that the Perpetual litigation
10 is a fair model for what we're dealing with today. But my
11 understanding of the Perpetual litigation in London is that
12 Perpetual, a fund located in Australia that does not do
13 business, as far as I understand it, in the United States,
14 brought suit against BNY as corporate trustee in London as
15 beneficiary and brought a claim against its trustee.

16 In effect, it's what you might have done here if you
17 had the ability to do it against HSBC Bank U.S.A. as trustee,
18 and we'll deal with this with your colleague when he comes up
19 for the HSBC part of the argument. But my understanding is
20 that the wrong parties were sued. We can talk about that.

21 It's one thing for a trust beneficiary to have a claim
22 under the trust agreement that might be cognizable under the
23 trust instrument. It's another thing for you to be where you
24 are up in the chain as creditors of Pacific Finance with an
25 indirect interest in an asset which is held in trust to be

1 pursuing that claim in a United States bankruptcy court with
2 your hook to jurisdiction being claims against LBSF as swap
3 counterparty and arguing that LBSF should not be asserting
4 rights with respect to the underlying asset.

5 That's what's going on here and I view that as
6 materially different in structure and purpose from what
7 happened in London, which is a very simple in the sense of the
8 parties' lineup, claim by a beneficiary against a trustee with
9 respect to the disposition of trust property.

10 MR. DAVIS: If I may respond, Judge.

11 THE COURT: Sure.

12 MR. DAVIS: And if it pleases the Court, may I just
13 point something out on the demonstrative?

14 THE COURT: Absolutely.

15 MR. DAVIS: Okay. So what -- the most important line
16 that is missing from this chart, Judge, is a line from HSBC
17 U.S.A. as trustee to the bondholders. Now, LBSF admits in its
18 papers that this line should be here. So right here the
19 analogy to the Perpetual matter, Judge, would be Bank of New
20 York as trustee of that bond program, Perpetual as the trust
21 beneficiary of that program. And here HSBC as trustee under
22 the minibond program and plaintiffs as trust beneficiaries
23 under the minibond program. That's the analogy, Judge. And
24 the difference which LBSF will point out is the argument in
25 that case was focused on the trust documentation. And while

1 that's a critical argument in this case, it's the argument that
2 LBSF says they have seniority in the waterfall structure and
3 therefore are entitled to everything. That's a critical
4 component of this case, Judge. But in addition to that the
5 question is the disposition of the sole asset that's held in
6 trust and that's the Sapphire note.

7 Now the reason that we needed to name LBSF as a
8 defendant, Judge, is because in between that line, between HSBC
9 as trustee and the noteholders as trust beneficiaries in a
10 postdefault context, LBSF jumped in the middle of that
11 relationship where the trust assets should have been
12 liquidated. They should have been liquidated a year ago Judge,
13 and said hold up, this entire bond program and specifically the
14 letter that it sent, which is attached as an exhibit to our
15 document, was sent not to -- was sent to HSBC as trustee of
16 this minibond program. And so that's the similarity, Judge,
17 and that's the reason why, under English law, plaintiffs have
18 the right to seek an adjudication of the bond terms, of the
19 trust indenture to which they're trust beneficiaries, exactly
20 as Perpetual is.

21 THE COURT: Perpetual, however, as a foreign entity
22 sued as a trustee in a foreign court. Here we have foreign
23 individual holders of the minibonds suing through U.S. counsel
24 in a United States bankruptcy court. I don't think it's
25 exactly parallel at all.

1 If you had, in Hong Kong, sued the trustee because you
2 believe the trustee was not taking appropriate action and you
3 wanted to break the log jam there, more power to you. What are
4 you doing here?

5 MR. DAVIS: It's a fair question, Judge. The reason
6 that we brought this suit here is because LBSF was the one who
7 has frozen the entire program.

8 Now it's a fair observation, Judge, the documents are
9 governed by English law, Perpetual is an Australian company,
10 most of my clients are Hong Kong individuals. And to that
11 extent they're both foreign and the Hong Kong individuals could
12 have brought litigation in the United Kingdom, specifically in
13 London, under English law. What would have happened? They
14 would have tried to bring the entire case here and would have
15 accused plaintiffs of violating the automatic stay. We wanted
16 to be conservative and bring the claims in the one court that
17 can decide these questions definitively and break the log jam.

18 Now suppose, Judge, we got a decision in Hong Kong
19 court in English court, what's the next step? More
20 communication between judges as to which jurisdictional law
21 should apply? Who should apply it? It was clear, based on the
22 letter that LBSF sent to HSBC, that the reason that the entire
23 program was being locked up is because of the U.S. bankruptcy
24 law.

25 Now, I don't know if an English court can apply that

1 law or not. I confess, I followed some of the filings in that
2 Perpetual case and I'm not sure exactly how that's going to
3 work out. What I do know, for a cold, hard fact is that this
4 Court can apply bankruptcy law and adjudicate this question
5 definitively.

6 THE COURT: All right. Proceed with your argument.

7 MR. DAVIS: The second principle argument that -- the
8 second basis for standing, Your Honor, is -- would be
9 derivative.

10 Now, we requested leave to amend under Rule 15 if the
11 Court found that plaintiffs didn't have the ability to bring
12 the suit directly. So the question then would be, under
13 English law what are the circumstances in which a trust
14 beneficiary can step into the shoes of the trustee and litigate
15 a claim that purportedly belongs to the trust.

16 Now in that circumstance, Judge, the situation would
17 be absolutely identical to what's going on in London. Because
18 Perpetual, like HSBC, holds -- Perpetual, like HSBC, is a
19 trustee for other investors. And if we stepped into the shoes
20 of HSBC as trustee, we would be litigating almost the identical
21 issues with the one important exception and that is once it's
22 cleared up, whether the terms of the asset that's held in trust
23 are enforceable as a matter of English law and as a matter of
24 U.S. bankruptcy law, the question then becomes how is it
25 distributed. And that's the next point I want to address, that

1 counsel for LSBF raised.

2 So the primary argument that LBSF makes as to how that
3 asset is distributed really hinges a hundred percent on the
4 payment priority provisions in the trust documents. And
5 basically what they say is the allegations that plaintiffs make
6 that they're entitled to a hundred percent of the Sapphire
7 notes, save customary and administrative fees, is not a valid
8 claim because we're higher in the payment priority hierarchy.
9 But judge, if they only have a one dollar interest in the
10 trust, they don't have a superior interest when ninety-nine of
11 the rest of the dollars, assuming par value of the note, goes
12 to the plaintiffs. So the entire argument that they raise
13 about payment priority is not valid. And what really needs to
14 happen, after the presentation of evidence, is a determination
15 of what, if any, termination payments they're owed.

16 Now the way that it works, and I can point the Court
17 to the provisions in the supplemental trust deed that govern
18 this question, is very similar to something the Court is
19 already considering in the Ballyrack (ph.) matter. The
20 question under how the termination payments are determined in
21 the HSBC trust, to which plaintiffs are beneficiary, is really
22 a question of can you find somebody else to replace LBSF?
23 That's the question. And in all honesty, Judge, that's going
24 to require an expert to get down to the last penny. But the
25 fact of the matter is that LBSF doesn't get to choose -- the

1 fact of the matter is that LBSF does not get a hundred percent
2 of the distribution of the Sapphire notes which, if they're
3 enforceable under U.S. bankruptcy law, are worth a hundred
4 cents on the dollar.

5 So the other -- the only other point I wanted to make
6 with respect to the argument that the payment priority
7 provisions are a hundred percent outcome determinative is you
8 really won't hear counsel say we're entitled to a hundred
9 percent of the assets. That's simply not true. And as alleged
10 in the complaint we believe plaintiffs are entitled to the
11 overwhelming majority, if not a hundred percent of that. And
12 we think it's appropriate to allow that claim to go forward and
13 test it with discovery.

14 Look at the documents, what do the documents say? If
15 expert reports need to be brought in, expert reports are
16 brought in. But the bottom line, Judge, is that the right
17 result is reached and we're not standing around in limbo for
18 another year while these bonds are supposed to be paying
19 interest and are supposed to have returned a hundred percent of
20 their collateral but have not.

21 THE COURT: Do you know if any of your individual
22 clients have accepted the offer being sponsored by the Hong
23 Kong Monetary Authority?

24 MR. DAVIS: Yes, Judge. I believe that three of our
25 clients either have or will accept a buyback. And for the

1 record, we don't stand in the way of that buyback program. But
2 four of our clients either cannot or will not, it's my
3 understanding, as of today. And there's an important factual
4 clarification I just want to make on this repurchase program.
5 And that is 8,000 people aren't even eligible for it. The
6 number that they're describing, this 25,000 individual number,
7 is the number of people who are eligible for it. And I'm not
8 going to waste the Court's time explaining all the different
9 criteria for being eligible or not. But suffice it to say
10 there are a lot of people who aren't hedge funds who are not in
11 the 25,000 person number. There are thousands of other people
12 who would never fall in the definition of a quib (ph.) in the
13 United States, Judge. And all of those people have received
14 zero.

15 And the only other point that I wanted to make with
16 respect to this repurchase program, is that there's a provision
17 that allows any additional collateral that's recovered under
18 this program that's held in the HSBC trust, to which our
19 clients are beneficiaries, any incremental collateral that's
20 collected over that sixty to seventy percent passes directly
21 through to all of those people who participated in a program.
22 And that's an interest that those individuals still hold.

23 For that reason, Judge, it's very important to decide
24 this question once and for all. I understood the Court's
25 question with regard -- in this court. I understood the

1 Court's questions with regard to the forum, whether it should
2 be in Hong Kong, whether it should be in London. But at the
3 end of the day, Judge, this is the only court that can
4 definitely break this log jam.

5 THE COURT: You keep calling it a log jam, and I
6 picked it up at one point, it's hardly a log jam when the Hong
7 Kong Monetary Authority is providing what's really an
8 extraordinary remedy for the holders of these minibonds to the
9 extent they qualify. It's the farthest thing from a log jam.
10 In fact, it's a creative form of restitution. What happens
11 after that, I don't know. But why don't you stop calling it a
12 log jam, you have a litigation claim, period.

13 MR. DAVIS: Yes, Your Honor.

14 THE COURT: And as far as your pursuit of HSBC Bank
15 affiliates, I don't understand and I realize that you may not
16 be the right person to answer this; I don't understand why the
17 right party has not been named and what your purpose is in
18 pursuing litigation against affiliates that are not the
19 trustee.

20 MR. DAVIS: Judge, my understanding is, on the Court's
21 first question the proper party the proper trustee being named,
22 my understanding, Judge is there was a breakdown in
23 negotiations. HSBC wanted to extract some concessions that we
24 weren't able to give and all of the briefing on all of these
25 questions was already underway.

1 And I also understand that the general rule is if the
2 right party is on notice and knows that it's been named but for
3 an error in the complaint, that's sufficient under the rules.
4 Now counsel for HSBC, the firm here represents all of these
5 HSBC entities and it's true that there was a breakdown in the
6 negotiations over swapping out the right name for the trustee.

7 But what's also clear is that the right named party
8 knows that it's been named and has been making very detailed
9 arguments in its motion to dismiss, both on subject matter
10 jurisdiction grounds, forum non conveniens grounds and all of
11 the individuals who are affiliated with creating these bonds,
12 they're seeking to exclude them on personal jurisdiction
13 grounds.

14 THE COURT: Look, I'm not presiding over negotiations
15 to name the right party. I'm presiding over an argument in
16 connection with separate motions to dismiss. But I've spent
17 some time reading papers having to do with arguments made by
18 HSBC parties that have no business being in this litigation and
19 I don't understand why the plaintiffs haven't simply dropped
20 them. Why should I be hearing an argument in respect of an
21 HSBC entity that isn't the trustee and that has a perfectly
22 good basis for saying I want out and I shouldn't be paying
23 counsel fees to get out?

24 MR. DAVIS: It's a fair question, Judge. And if we
25 could rewind the clock and these negotiations had occurred

1 before all of these documents had been filed, maybe we would
2 have done things differently. What we did say is look; we're
3 not standing on our papers and saying that we named the right
4 party. We said we've made a mistake. We sought leave to
5 amend. And what's clear is that all of the substantive
6 arguments that would be made by the trustee are being made.
7 Why? Because the trustee knows that it's been named.

8 And as to the other HSBC --

9 THE COURT: But the argument that's being made by the
10 defendants here piece together as whole in this respect, they
11 think they've been wrongly sued. And even if you had named the
12 right trustee, the right trustee would say what are you doing
13 here in a United States bankruptcy court. That gets into the
14 forum non conveniens and abstention arguments that I'm not
15 really addressing right now, I wasn't asked to address right
16 now.

17 But there's something about this that seems vexatious
18 to me.

19 MR. DAVIS: I misunderstood your first question,
20 Judge. So the question is as to the other HSBC entities, why
21 are they here?

22 THE COURT: Why are they still in the case at all?

23 MR. DAVIS: Yes, Judge. So Pacific International
24 Finance that issued securities that were tied to synthetic
25 collateralized debt obligations, that were tied first to

1 default credit swap baskets that were ultimately tied to
2 hundreds of derivative transactions, transactions that Warren
3 Buffett had called weapons of mass financial destruction, these
4 derivative transactions. Pacific International Finance sold
5 these to retail investors.

6 Now Pacific International Finance is directed by HSBC
7 employees who are employees of HSBC Cayman. And those two are
8 defendants, Judge. And Pacific International Finance is a
9 defendant as well. And the gravamen of the allegations against
10 this cluster of HSBC entities is number one; you can't sell
11 credit default swap linked assets to retail investors. And
12 number two, you said that you would carefully select and
13 package this deal. And it's very clear, from how things have
14 panned out, that that wasn't done. Now that was the basis for
15 bringing them into this litigation.

16 Now it's fair that there are different issues with
17 respect to LBSF and these HSBC entities. But because the facts
18 and circumstances appeared interrelated, Judge, it made sense
19 to bring them all in one forum.

20 THE COURT: Maybe I misunderstood what your complaint
21 was about. But I never understood that this was a complaint
22 that was about the inappropriateness of retail investors buying
23 into credit default swap linked securities sold offshore. I
24 mean, is that what this case is about?

25 MR. DAVIS: As we said in the complaint --

1 THE COURT: I thought this case was about the Sapphire
2 notes and the value of those notes and getting to collateral
3 and a trustee that wasn't acting and in your words a log jam.
4 It seems to me that you're coloring it with issues that really
5 aren't before me, aren't you?

6 MR. DAVIS: Judge, one way to think about it is, from
7 our client's perspective, they just want to get what Pacific
8 Finance told them they'd get and that is their principle and
9 interest back. And so in terms of sequencing the issues that
10 need to be litigated, it's very possible Your Honor that
11 plaintiffs could receive a hundred cents on the dollar just
12 after figuring out what's the value of the Sapphire note and how
13 much of it should be passed through to investors.

14 But it's also true that these notes were
15 inappropriately sold to a lot of retail people. And if it's
16 true, as LBSF seems to suggest, that the noteholders aren't
17 entitled to anything then we'd want to litigate that question
18 as well. And so maybe the better way to think about it or one
19 way to think about it is maybe it makes sense to litigate the
20 questions just on the terms of the trust documents, what the
21 value of that asset is held in trust, how it should be
22 distributed first. Because obviously if plaintiffs receive a
23 hundred percent of their investment back then there's no need
24 to litigate the other claims.

25 THE COURT: Okay. We're way off topic. The topic is

1 why the motions, in your view, should not be granted.
2 Presumably there are reasons that have to do with standing.
3 And if there's more that you need to say about that, you
4 should. If you're mostly done, I should hear from your
5 colleague.

6 MR. DAVIS: Okay. I would just summarize a few points
7 because LBSF counsel said that if plaintiffs -- that plaintiffs
8 -- it would be futile to allow plaintiffs to amend the
9 complaint to bring the case derivatively if it needed to be
10 brought derivatively. And our position, Judge, is it doesn't.
11 And really the question boils down to whether there are special
12 circumstances in this case that would warrant bringing the case
13 derivatively.

14 And the points that I would make is HSBC does have a
15 234 million dollar conflict of interest. It is its other --
16 there are -- that money owed by the bankruptcy estate to HSBC
17 affiliates is a substantial conflict and that's one thing that
18 courts consider. The second point, Judge, is that LBSF, in
19 their papers, they say that not only are the noteholders trust
20 beneficiaries of this trust but they too are trust
21 beneficiaries of the same trust.

22 So going forward how is HSBC trustee to discharge its
23 fiduciary duties owed to two different groups of trust
24 beneficiaries who have exactly diametrically opposed economic
25 claims to the exact same limited fund. It's impossible and

1 that's a special circumstance that a court could consider.

2 The other point that I want to make, Judge, is LBSF's
3 cease and desist letter really impacts a personal right that
4 the noteholders have. In the postdefault context the asset's
5 supposed to be delivered to the investors to make them whole
6 for their investment. That's how it was supposed to work.
7 That's not a right that belongs just to HSBC. In a postdefault
8 environment that should be paid over to the investors.

9 Those are the primary points I just wanted to make.
10 If the Court wanted some clarification on the first question
11 regarding how documents were virtually identical and how that
12 plays into the arguments, I'm happy to entertain that question
13 as well.

14 THE COURT: I don't think I need to hear more on that.

15 (Pause)

16 MR. BROOKS: Good afternoon, Your Honor. Luke Brooks
17 from the Coughlin Stoia firm. And before I get started I'll
18 note that I have a pro hac application pending, I don't think
19 it's signed yet. So with that --

20 THE COURT: Consider it signed for today's purposes.

21 MR. BROOKS: Thank you, Your Honor.

22 Your Honor, you touched on some of the issues in the
23 HSBC motion with Mr. Davis. There really are two different
24 parts to this case. HSBC addresses in its motion, essentially,
25 the second part of the case which are claims IV through XIII.

1 And those are claims for a breach of contract, breach of
2 fiduciary duty and other claims that we have related to both
3 predefault conduct and selling the notes and postdefault
4 failure to act in getting the collateral back. And Judge,
5 they've moved so when we're talking about forum non conveniens,
6 really only those claims are at issue here. Nobody has moved
7 to, for forum non conveniens for claims I through III.

8 Again, HSBC moved on subject matter jurisdiction on
9 those claims and Your Honor subject matter jurisdiction is
10 proper over those claims. They arise from the same facts and
11 they're related to the bankruptcy. And I know that we have an
12 issue regarding the named trustee in this case but I will note,
13 Judge, that the named trustee or the trustee HSBC Bank NA in
14 the bankruptcy filing filed a proof of claim. And I don't know
15 if the Court is aware or is focused on that issue but in that
16 proof of claim they've sought indemnification from any damages
17 that we get against HSBC, they're seeking indemnification from
18 LBSF. And so given that new fact that happened in September
19 after this was fully briefed, I don't think there's really any
20 question that there is subject matter jurisdiction under
21 related to for these claims IV through XIII.

22 THE COURT: I think there is a question but I don't
23 know that we need to address it now. The fact that HSBC, and I
24 don't know which HSB entity we're talking about, filed a proof
25 of claim before the bar date and included within that proof of

1 claim some kind of saving provision that included in the claim
2 some additional potential items that might be associated with
3 this litigation does not make this litigation related to that
4 proof of claim nor does it make it related to the bankruptcy
5 case. All that it does is demonstrate that some lawyer, who
6 prepared the proof of claim, was thoughtful enough to think
7 well, couldn't hurt so I'll throw it in. I assume that's how
8 it happened because it's not a direct claim; it's a contingent
9 claim in all respects. And I have no idea whether or not there
10 is or is not any entitlement to indemnity with respect to that
11 claim and it's not before me at the moment.

12 Furthermore, as to the many thousands, if not tens of
13 thousands, of claims that have been filed in the Lehman case,
14 happily none of them are before me, yet. That day will come,
15 no doubt. That day is not today.

16 So I dispute, for purposes of this record, your
17 assertion that the fact that HSBC filed a proof of claim
18 somehow bootstraps you into related to jurisdiction for
19 purposes of this case. I don't believe it does.

20 MR. BROOKS: And Your Honor, I just want to make
21 clear, it's not that it bootstraps us in; I wanted to get this
22 fact out on the record and let the Court know and be aware of
23 it. Again, from day one we have said that these claims are
24 interrelated. The claims on IV through XIII are interrelated
25 with the claims on I through III. And we assert, Judge, that

1 that gives us subject matter jurisdiction to be here in
2 bankruptcy court to pursue those claims.

3 THE COURT: Okay. Well, it's an intriguing argument.
4 Because generally speaking when there are claims between
5 nondebtors they try, with all their might, not to be in
6 bankruptcy court. You seem to be doing the opposite, you're
7 suggesting that claims against nondebtors should be heard in
8 bankruptcy court notwithstanding the fact that the causes of
9 action all relate to events that took place in Hong Kong.

10 MR. BROOKS: Well Your Honor, they don't correlate,
11 necessarily, to events that took place in Hong Kong. Again,
12 there are postdefault claims regarding HSBC's failure to pursue
13 this collateral that relate to events that took place in New
14 York where LBSF, HSBC bank, the trustee, is a corporate citizen
15 and where the collateral is located.

16 And so, some of the claims relate to acts in Hong
17 Kong, marketing of the minibonds and the sale of the minibonds
18 and Pacific Finance and HSBC's general failure to protect the
19 interests of these retail investors. Some of the claims arise
20 from events here. But for -- I'm not sure if the Court is
21 addressing a subject matter jurisdiction or a forum non
22 conveniens question, in any event there's no -- if the Court is
23 interested in forum non conveniens --

24 THE COURT: I think we should focus on the issues and
25 only the issues that relate to the motions to dismiss that are

1 before me.

2 MR. BROOKS: Both of those are before you, Your Honor.
3 They've moved for dismissal based on subject matter
4 jurisdiction arguing that claims IV through XIII only are not
5 related to the bankruptcy and therefore we don't have a
6 jurisdictional hook.

7 The second argument they've made is forum non
8 conveniens. If I understand the Court that the Court's
9 inclination is going to be to dismiss on subject matter
10 jurisdiction, I won't waste the Court's time discussing forum
11 non conveniens. I will just remind the Court that those forum
12 non conveniens arguments only apply to claims IV through XIII.
13 They have nothing to do with I through III and the issues
14 regarding the declaratory relief, the constructive trust and
15 the resulting trust.

16 THE COURT: All right.

17 MR. BROOKS: Thank you.

18 (Pause)

19 THE COURT: Any more?

20 MR. SLACK: I promise to be brief, Your Honor, with a
21 couple of points. The first point that I think counsel for the
22 plaintiffs made was that somehow there is a difference in the
23 documents predefault and postdefault. And I went back, I had a
24 little time, and looked at the brief that was filed and
25 listened to the argument and there isn't a single provision of

1 the principle trust deed that's discussed that changes based on
2 whether you're in a predefault mode or postdefault mode. And
3 in particular, Your Honor, the provisions that talk about
4 standing, section 1.4 of the principal trust deed and 6.2 of
5 the supplemental trust deed, do not change or alter in any way
6 whether you're in a predefault mode or a postdefault mode.

7 The second point, Your Honor, there was some
8 discussion that the noteholders are beneficiaries of the trust.
9 And that is not -- that is not disputed. The provision though
10 that Professor McCormack cited, you know, that was cited by the
11 plaintiffs from Professor McCormack's declaration says that
12 they have a junior interest, the very provision that he read.

13 The second point, Your Honor, is just because you are
14 a beneficiary of the trust doesn't mean that the trust
15 documents allow you to sue third parties based on governing
16 documents. In other words, they are bound by, as
17 beneficiaries, the documents under the trust. And Your Honor,
18 I mentioned, for example, a case under U.S. law that dealt with
19 23.1 and it was the Eighth Circuit case that I mentioned. And
20 in that case you had beneficiaries of a trust. The fact that
21 you are a beneficiary of the trust doesn't give you rights that
22 are outside the trust documents. In fact, many trust documents
23 have restrictions. These trust documents have specific
24 provisions that deal with who can sue on the governing
25 documents.

1 Lastly, Your Honor, on the Perpetual matter.
2 Perpetual sued the trustee, which I think is very different and
3 I don't know the claims that were brought specifically but
4 Perpetual was also a hundred percent noteholder. Whatever
5 their theory was, presumably a hundred percent noteholder can
6 either direct the trustee or have a direction under the
7 documents and I haven't studied the Perpetual documents. But
8 the fact that you have a hundred percent of the notes is a very
9 different situation. And you have certain abilities to direct
10 under most no action clauses and the like and most trust
11 documents that you don't have if you're merely seven out of
12 30,000.

13 So Your Honor, the last point I guess I would point
14 out is that whether you're in predefault or postdefault the
15 documents work the same way, which is that if you have a claim
16 Pacific would make a claim against LBSF on that chart, right,
17 you owe us money. Pacific would pay the trustee, right, which
18 pays the swap counterparty. The trustee, actually, is the one
19 that makes the payment. And then, if anything is left from the
20 payment to LBSF from the trustee, then it goes to the minibond
21 holders. And that is the same whether you're in predefault
22 mode or post -- I mean, that is just the way the documents
23 work. There is no change in the documents based on, at the
24 minibond level, based on a default.

25 So with that, Your Honor, unless you have any

1 questions, I don't have anything further.

2 THE COURT: Mr. Sloane?

3 MR. SLOANE: Very quickly, Your Honor, just a couple
4 of points. Perpetual -- Your Honor's right. Perpetual has
5 nothing to do with this case. It's not this case. It has
6 nothing to do with the issues here. The waterfall, at least
7 insofar as the plaintiffs characterize it, really is not an
8 issue here as it is in Perpetual, as it is in some of the other
9 cases.

10 Mr. Davis said, why are we here and not the U.K.? We
11 all know why we're here. We're here because the plaintiffs
12 were looking for a place that accepts class actions and accepts
13 contingent fees. And I say that because, as I said earlier, it
14 is relevant to the question of gamesmanship. And gamesmanship
15 is exactly what the forum non analysis looks to prevent.

16 Finally, Your Honor, I just wanted to point out that
17 some smart lawyer did indeed make the filing of the proof of
18 claim a contingent claim that includes a contingent claim in
19 respect of this proceeding. Your Honor's absolutely right,
20 that has absolutely nothing to do with this adversary
21 proceeding, which they seek to prosecute. Indeed, if anything,
22 it argues against the plaintiffs' position because their
23 position is the trustee was asleep. Well, the trustee has
24 pursued the remedies and the proper party that did file it was
25 the proper HSBC Bank U.S.A. National Association not the

1 defendant in this case.

2 Thank you, Your Honor.

3 THE COURT: Okay. I'm going to take a ten minute
4 break and think about whether or not I want to say anything
5 now. And I'll come back in about ten minutes and I will say
6 something, I'm not sure what it's going to be other than have a
7 nice afternoon and I'll see you in ten. We're adjourned till
8 then.

9 (Recess from 3:58 p.m. until 4:12 p.m.)

10 THE COURT: Be seated, please. I was looking at my
11 calendar, what I think makes sense to do here is to add this to
12 the adversary proceeding portion of the November 18th omnibus
13 hearing agenda for purposes of a status conference, recognizing
14 that I will either provide a bench ruling at that time or give
15 you some indication as to where I am in the process of deciding
16 this. And would suggest that you don't need three lawyers on
17 one side, but I would suggest that those who feel that it's
18 appropriate to be present show up and I'll tell you what I
19 think at that time.

20 We're adjourned till then.

21 (Proceedings concluded at 4:13 p.m.)
22
23
24
25

C E R T I F I C A T I O N

I, Pnina Eilberg, certify that the foregoing transcript is a true and accurate record of the proceedings.

Pnina Eilberg

AAERT Certified Electronic Transcriber (CET**D-488)

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